

Claimant: Trufaw Pty Ltd

Respondent: William Shalhoub Pty Ltd

Adjudicator's Decision under the Building and Construction Industry Payments Act 2004

I, Chris Lenz, as the Adjudicator pursuant to the *Building and Construction Industry Payments Act 2004* (the "Act"), decide (with the reasons set out below) as follows:

1. I find that the adjudication application was made outside the time prescribed by the Act and therefore cannot value any adjudicated amount for the adjudication application dated 13 February 2009, nor establish a date on which it is payable, nor establish the rate of interest payable.
2. The Claimant is liable to pay the ANA's fees and the adjudicator's fees.

Signed: .....

Date: 27/2/09.....

Chris Lenz Adjudicator

Background

1. Trufaw Pty Ltd (referred to in this adjudication as the "Claimant") supplied a solar hot water system and solar panels and supplied and installed insulation batts (the "work") for William Shalhoub Pty Ltd (referred to in this adjudication as the "Respondent") at 57 Bryce St, MOFFAT BEACH in Queensland (the "site").
2. The Claimant's material included invoice no's. 993 dated 17 October 2008, and 1044 dated 6 November 2008 which was sent to the Respondent's postal address. Invoice 993 referred to "supply and install fat batts" for an amount of \$1,657.00 including GST. Invoice 1044 referred to "plonk on only" solar hot water tank, solar panels and install kit for an amount of \$2,850.00 including GST. Each invoice was properly endorsed, as each stated that it was a payment claim made under the *Building and Construction Industry Payments Act 2004* (the "Act").
3. Under cover of a statement dated 6 January 2009, which was also endorsed, the Claimant sent the invoices by facsimile stating that an amount of \$4,507.00 was due. The Claimant provided a copy of its facsimile transmittal, which showed that no fax was sent to the Respondent on 6 January 2009, but there was a 3 page fax sent on 7 January 2009.
4. On 21 January 2009 the Claimant faxed a notice to the Respondent stating that it had faxed the payment claim on 6 January 2009 and had received no payment schedule and therefore intended applying for adjudication, and invited the Respondent to provide a payment schedule within 5 business days, and it attached the payment claim (the "notice"). There was a facsimile transmittal substantiating the transmission of the notice.
5. On 27 January 2009 the Respondent responded by facsimile and stated, "Mike, Sorry about the delay in payment have had problems with getting payments will get this paid this week as we are expecting monies. Regards Bill Shalhour"
6. In response to this facsimile, the Claimant provided advice by facsimile on 4 February 2009 that if payment was not received by 11 February 2008 (sic), it would immediately apply for adjudication. This was substantiated by a facsimile transmittal.
7. On 13 February 2009 the Claimant lodged an adjudication application with the Queensland Law Society ("QLS") by facsimile. There were no submissions provided by the Claimant, so I have been confined to the correspondence provided by the Claimant.
8. There was no adjudication response received from the Respondent.
9. I therefore have no submissions from either party to assist in this adjudication, so I need to carefully consider the provisions of the Act and the facts to ensure that justice is being done in terms of the Act.

Appointment of Adjudicator

10. The Claimant applied in writing to the Queensland Law Society ("QLS") on 13 February 2009 for adjudication. Subject to my finding jurisdiction, which is dealt with below, I find that the application in writing satisfies s21(3)(a) of the Act.
11. I find the application was to QLS, as an authorised nominating authority, with registration number N11064504, thereby satisfying s21(3)(b) of the Act.

12. By letter dated 17 February 2009, QLS referred the adjudication application to me by courier to determine, pursuant to s23(1) of the Act. I am registered as an adjudicator under the Act with registration number J622914. I accepted the nomination by facsimile dated 19 February 2009 sent to the Claimant and to the Respondent by facsimile, and thereby became the appointed Adjudicator by virtue of s23(2) of the Act.
13. I have no interest in the contract, nor I am not a party to the contract and I have no conflict of interest, which satisfies s22(2) and s22(3) of the Act. I have therefore been properly appointed under the Act as required by s23(2) of the Act.

Construction contract

14. In order to consider the adjudication application I need to be satisfied that I have jurisdiction to decide the application and s3 of the Act requires that:
 - a. the date of the *construction contract* (which can be written or oral, or partly written and partly oral) must be after 1 October 2004; and
 - b. the *construction work* that was carried out, or the related goods and services that were supplied for construction work, had to take place in Queensland.
15. I find that the supply of a Solar hot water tank and solar panels and supply and installation of fat batts insulation falls within the definition of Schedule 2 of the Act, which defines a *construction contract* as an agreement or other arrangement as follows:

“construction contract” means a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.”
16. I infer from the material provided in the adjudication that there was an agreement or other arrangement as the Claimant supplied goods and also installed some goods at a building situated at Bryce St, MOFFAT BEACH. The facsimile from the Respondent on 27 January 2009 which advised that the claim would be paid this week importantly did not deny the existence of an agreement.
17. I find that the installation of insulation batts falls within the definition of *construction work* as defined in s10 of the Act and that the supply of a solar hot water tank, solar panels and insulation batts falls within the definition of s11 of the Act dealing with *related goods and services*.
18. I was provided with invoices, the earliest of which was 17 October 2008 for the supply and installation of the batts, so I find that the construction contract for this work was entered into after 1 October 2004. I therefore find the construction contract for this payment claim was after 1 October 2004, and it related to *construction work* and/or the supply of *related goods and services* at Moffat Beach, which I find is in Queensland.
19. I find therefore that it is a matter which may be adjudicated.

Service of the payment claim and the adjudication application

20. I find from the material provided, and the facsimile number of the Respondent from the adjudication application [07 54441625] that both invoices 993 and 1044, together with a statement dated 6 January 2009 were served on the Respondent by facsimile on 7

January 2009. This was substantiated by the Claimant's facsimile activity report. This report showed no facsimile sent to the Respondent on the 6 January 2009, as asserted by the Claimant. Each invoice required payment 7 days after the date of the invoice.

21. I find that the statement attaching each invoice was the payment claim as it was suitably endorsed and identified the work carried out and the amount being claimed, thereby satisfying s17(2) of the Act.
22. The payment claim did not identify the time for payment. Although the invoices were overdue, I have found that the statement constitutes the payment claim, and there is no evidence provided by the Claimant demonstrating that the agreement provided for a due date for payment.
23. Accordingly, I refer to s15(1)(b) of the Act [which makes provision when the contract makes no provision about the date] and find that the due date for payment is 10 business days after service of the payment claim, which I have found to be the 7 January 2009. Therefore the due date for payment is 21 January 2009.
24. However, the Act provides timelines within which the parties to a dispute must operate and I need to be satisfied that the Claimant has kept within these timeframes for a payment to be due.
25. The adjudication application I find was delivered to the QLS on 13 February 2009, and the timing of this application relative to the previous service times of key documents is important in allowing a claimant to avail itself of the provisions of the Act.
26. The making of an adjudication application to an ANA is considered a basic and essential requirement under the case of *Brodyn Pty Ltd t/a Time Cost and Quality v Davenport and another [2004] NSWCA 3 [Brodyn]*, which has been referred to with approval in Queensland. At paragraph 53 [and following] of *Brodyn*, Hodgson JA held (with reference to the NSW Act:

"53 What then are the conditions laid down for the existence of an adjudicator's determination? The basic and essential requirements appear to include the following:

1. *The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).*
2. *The service by the claimant on the respondent of a payment claim (s.13).*
3. *The making of an adjudication application by the claimant to an authorised nominating authority (s. 17). my emphasis*
4. *The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).*
5. *The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).*

54 The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; my emphasis s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator's determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has

tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator's determination.

27. The payment claim was served on 7 January 2009 according to the Claimant's facsimile transmittal. This means the Respondent had 10 business days after the payment claim was served to provide a payment schedule: s18(4)(b)(ii) of the Act. I calculate that the Respondent had until 21 January 2009 to provide a payment schedule, and it did not do so, as none is in the material. However, on this day the Claimant faxed the notice to the Respondent, which is on the 10th business day.
28. This notice required the Respondent to provide a payment schedule within 5 business days and I find that this notice was premature, because the Respondent had until the end of 21 January 2009 to provide a payment schedule. In any event, there is no evidence of a payment schedule being delivered on 21 January 2009, so I am satisfied that there was no payment schedule under Division 1 of the Act.
29. I have also found that the due date for payment was 21 January 2009, and I find that no monies were paid on this date because the Respondent faxed an apology to the Claimant on 27 January 2009 saying that they had not had money to do so (the "apology facsimile").
30. The premature delivery of the notice, I find is not a basic and essential requirement of the Act, as identified in *Brodyn*. The Respondent has not complained about premature delivery, and responded with the apology facsimile a few days later. It appears that the Claimant thought that it had faxed the payment claim on the 6th January 2009, which, if correct, would have meant that the notice was not premature.
31. However, the Claimant's facsimile transmittal does not substantiate this fact, and I am obliged to make findings on the material provided to me, and I have found that the payment claim was faxed on the 7th January 2009 because there were only two facsimiles sent by the Claimant on the 6th January 2009, and neither of them were to the Respondent's facsimile.
32. Having established that the premature notice is not a basic and essential requirement, I must consider in the light of the material before me, which is evidenced by the correspondence between the parties, whether this premature notice has prejudiced the Respondent. I find that the Respondent did respond to the notice, because of the 27 January 2009 apology facsimile in which it stated that it did intend to pay.
33. s18(2) of the Act provides:

"(2) A payment schedule—
(a) must identify the payment claim to which it relates; and
(b) must state the amount of the payment, if any, that the respondent proposes to make (the **scheduled amount**)."
34. I find that this apology facsimile, by inference, referred to the payment claim and therefore identified it, as the material demonstrates correspondence between the parties about this site and the monies owing. In addition, I infer from the words of the facsimile that the Respondent intended to pay the amount claimed. There was no denial about the claim or the amount evident in the facsimile, so I am satisfied, with some straining of the words of the Act, that this was a payment schedule.
35. Accordingly, I do not find that the premature notice prevents me from considering the matter further, as I have found that a payment schedule was provided by the Respondent.

36. I must now consider the timing of the adjudication application, because the Act provides times within which the application should be made. I note that *Brodyn* [paragraph 54, referred to above] states that the timing of the adjudication application is a more detailed requirement, but I must look at the words of the Act as to this timing, because even as a detailed requirement, it may be vital to adhere to the time frames.
37. Unfortunately for the Claimant, and despite the Respondent stating that it intended to pay the Claimant, I am unable to find an adjudicated amount because I find that the adjudication application was made outside the 10 business days after the 5 business day period allowed in the notice.
38. The notice was dated 21 January 2009, so the 5 business day period after the notice takes one to 29 January 2009 (excluding the Australia Day public holiday in the calculations). Although I have found that a payment schedule was served on 27 January 2009, the time begins to run from the end of the 5 business day period. This means that the application was required to be made by the 12th February 2009 [within 10 business days after the end of the 5 business day period].
39. Unfortunately, despite advising the Respondent by correspondence that monies had to be paid by 11 February 2009 or an adjudication application would immediately be made, the Claimant only served the application on 13 February 2009, which I find is one day too late.
40. In my opinion, an adjudicator is not in a position to allow the strict time limits required by the Act to be ignored, just because *Brodyn* considers the timing of an adjudication application to be a more detailed requirement. The words of the Act must be followed, and time limits under this Act have to be strictly followed because the time frames are so short. If an adjudicator had the power to extend time limits, in my view, the Act would soon become unworkable.
41. I have troubled by this harsh result and researched any cases on point, and had regard to McDougall J's judgement in *Multipower v S & H Electrics [2006] NSWSC 75* where His Honour dealt with a late adjudication application assertion by the Respondent and His Honour held at [41]:

*"41 It follows necessarily from what Hodgson JA said in *Brodyn* that, even if the adjudication application had been made out of time, the adjudicator's implicit conclusion that it was made within time does not mean that the determination is void. At most, and assuming error, there would have been an error within the scope of the jurisdiction that is entrusted to adjudicators: a mistake that the adjudicator would have been entitled to make."*
42. I have had to consider the material before me and am satisfied of the correctness of the calculation of the timing of the application, and I cannot ignore the fact that the application was made a day late; however, close the Claimant was to being within time. It is not a case of me not considering the timing of the application, which is then later discovered to be out of time, as this could be considered an error by an adjudicator, which in my view is the circumstance being considered in *Brodyn* and *Multipower*.
43. It is not appropriate for any adjudicator to turn a blind eye to an application being out of time, when an adjudicator in my view needs to be satisfied that the Act has been complied with before making a decision.

44. This is obviously a harsh result for a Claimant whom the Respondent has agreed to pay, but the word *must be made within the following times* in my opinion, means that if an application is not made within the time specified, which I have found, then in my opinion, compliance with the Act has not been achieved. I do not think that an adjudicator has the power to extend time.
45. Accordingly, regrettably, I cannot proceed any further with the adjudication because I find that it was made out of time.

Chris Lenz
Adjudicator



27 February 2009